FILED
FEB 25 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1928.

No. 473

THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,
Appellees.

REPLY BRIEF OF APPELLANTS

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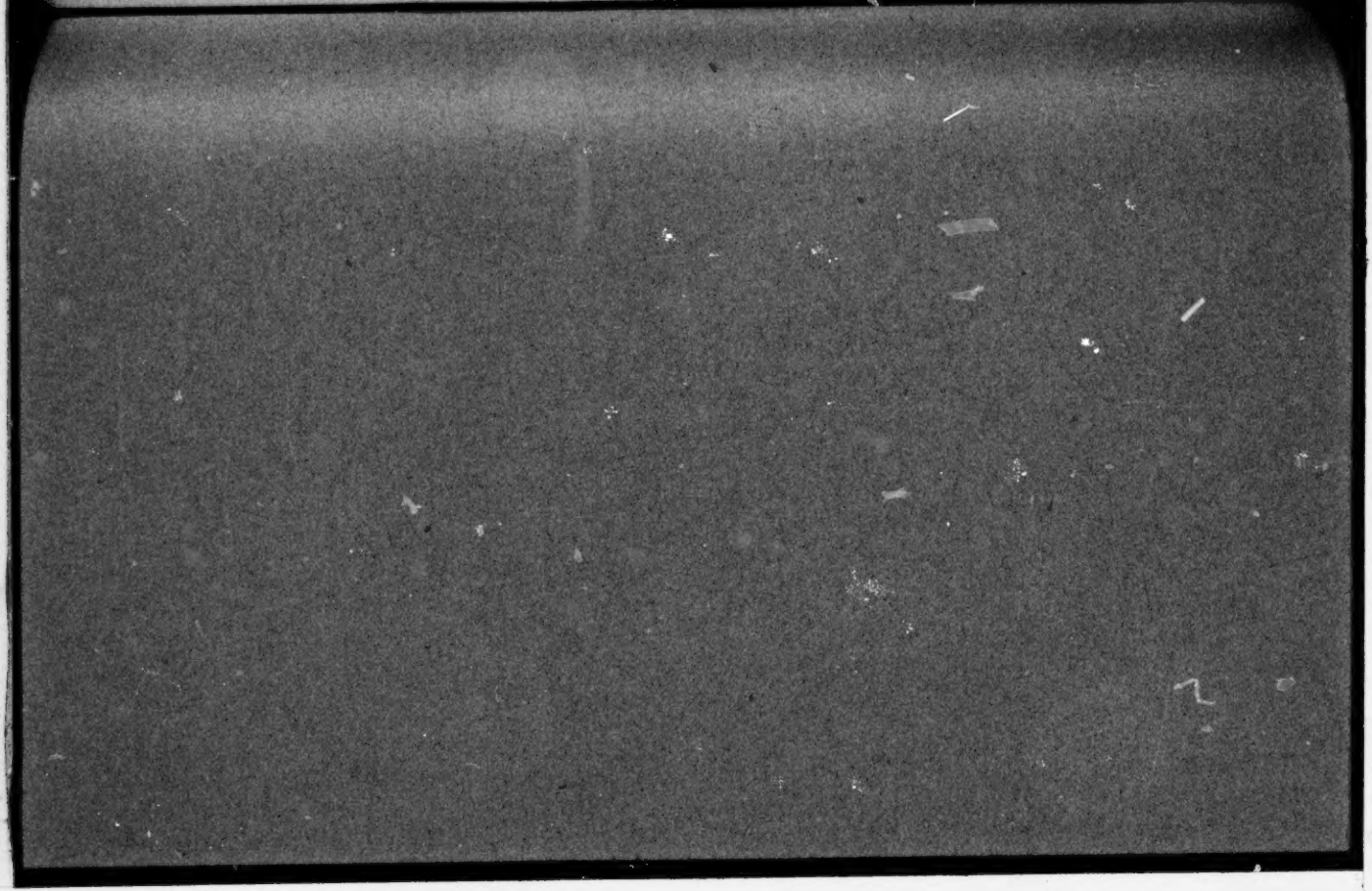

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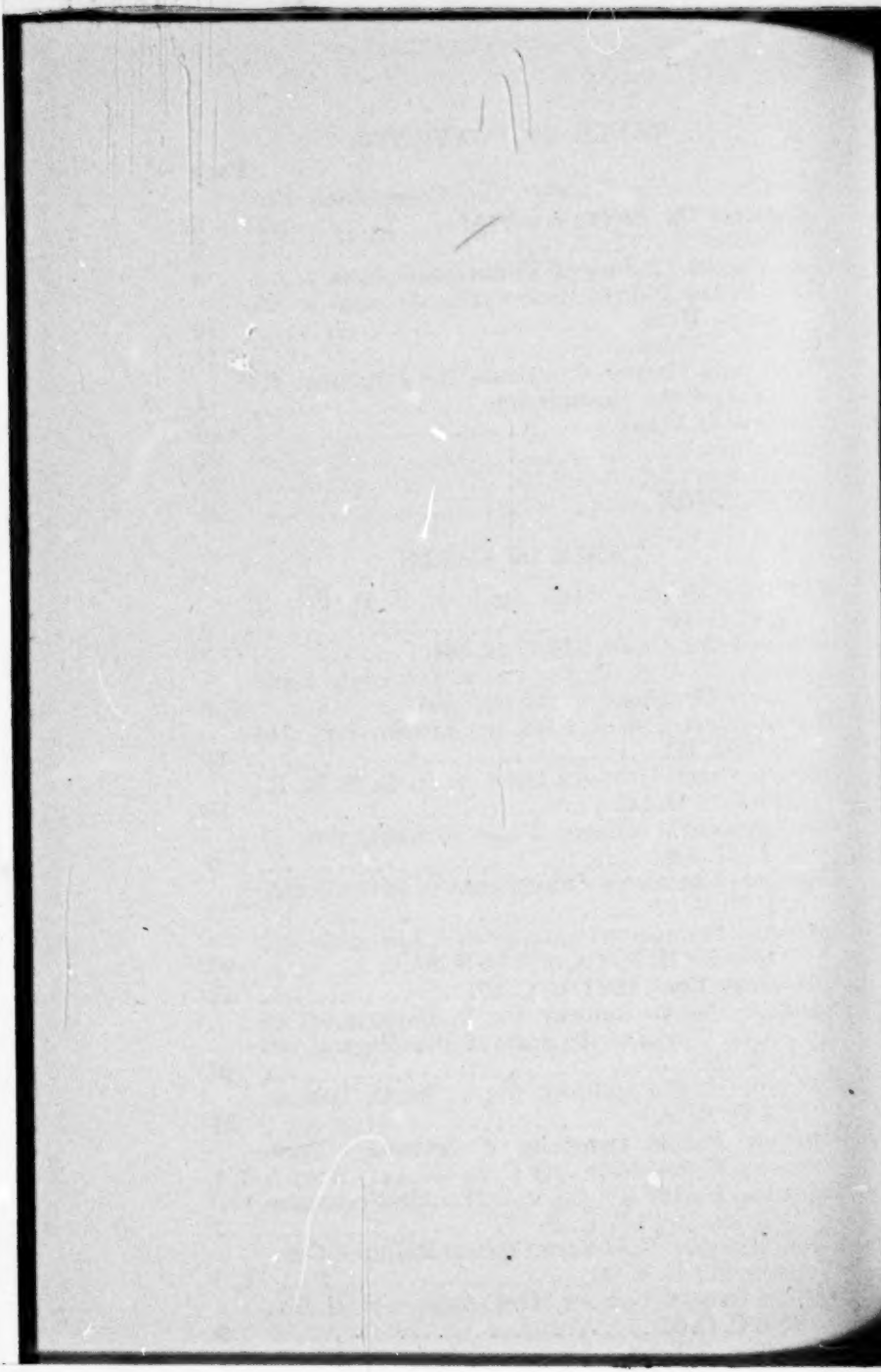

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Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,
Appellees.

REPLY BRIEF OF APPELLANTS

The briefs filed herein on behalf of the Appellees present a studied effort to avoid the issues arising from the Commission's interpretation of and action under the Hoch-Smith Resolution. The Resolution after having been invoked by the complainant before the Commission, after having been constantly referred to by the Commission throughout its decision, is now cast aside, and this court is told that this was but a "conventional rate case." It is frankly conceded by counsel for the Intervener that if the Commission undertook to do under its supposed authority and in at-

tempted compliance with the mandate of the Resolution what we contend that it did do, that the Resolution and the action of the Commission would be in violation of the statutory and constitutional rights of the carriers. (Intervener's Brief, p. 23)

In view of this attitude of the parties it becomes necessary to determine exactly what the Commission did, not what it might have done. In the words of Chief Justice White in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, at page 437:

> "When that which is superfluous is put out of view, it will come to pass that every substantial controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, what was the power which that body exerted in making the order in question."

To determine that we ask only that the court read the report of the Commission (R. 16-65) and its Report on Further Consideration. (R. 65-69) A reading of these reports must lead inevitably to the conclusion that the action of the Commission is predicated wholly upon its view that in a rate proceeding involving an agricultural product a showing that a depression exists, without more, compels the Commission to reduce the existing rate to the "lowest possible lawful rate" as defined by the Commission irrespective of whether the existing rate is reasonable and lawful under Section 1; in short, that rates on agricultural products suffering from depression, irrespective of the cause of the depression, are to be made on a different and lower basis than are rates on other commodities not suffering from depression.

The Question is Whether the Commission Possesses the Power Asserted.

The fundamental question here presented does not turn on whether or not the Hoch-Smith Resolution changed existing law or whether the Commission considered that it already possessed the supposed power which it undertook to exercise. If by its order the Commission fixed rates on agricultural products on a different basis because the industry was suffering from depression, than it would have prescribed for the products of a prosperous industry, it undertook to regulate industry and not to regulate commerce and for the reasons pointed out in our brief (pp. 118-150) such action is invalid because beyond the power of Congress itself to exercise, and hence incapable of delegation to the Commission.

A long line of decisions establishes beyond doubt that the Interstate Commerce Act has given no power to the Commission to undertake to regulate industry, or base its decisions on other than transportation considerations.

Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197,
Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433,
Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42,
United States v. New York Central Railroad Company, 263 U. S. 603,
Assigned Car Cases, 274 U. S. 564,
Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission, 190 Fed. 591.

The Report of the Commission treated the question as if a new duty had been imposed upon it by the Reso-

lution or at least that it had been directed to act in a particular way, where previously it had been free to exercise its discretion. Its previous action in finding these very rates not unreasonable is persuasive that it thought itself obligated to prescribe a different rate by virtue of the Resolution than without it.

However that may be, the question to be determined is "what was the power which that body exerted in making the order in question." If it be the power to fix rates on one commodity on any different basis than it applies to all commodities, and if such power is exercised not because of a difference in purely transportation conditions but on account of a different degree of prosperity in one industry than in another, it is an unlawful act and must be annulled whether founded upon a misinterpretation of the Hoch-Smith Resolution or based on an erroneous conception that it already possessed such power. If there is no statutory basis for such a power, the order falls because the Commission can exercise only such powers as are delegated to it by statute. If there is a statutory authority the order is void because Congress is without power to enact a statute regulating industry through the medium of regulating rates.

Whatever the source of the asserted power of the Commission, whether in the Hoch-Smith Resolution, or as a power alleged to already exist, the final paragraph of the Resolution as interpreted by the Commission furnishes a clear measure of the power which the Commission assumed to exercise. The Commission interpreted this paragraph to require it to take a definite and prescribed action with respect to rates on agricultural products suffering from depression. That the Commission in this case rigidly carried out this

mandate as it interpreted it, is patent from an examination of the report.

The Issues.

Apart from the issue of confiscation, to which we will refer later, the position of the parties may now be summarized as follows:

1. Appellants contend:

   a. That the order is based on the standards prescribed in the Hoch-Smith Resolution as interpreted by the Commission and not on Section 1 of the Act.

   b. That the Commission construed the Resolution as authorizing and requiring it to reduce an existing rate on agricultural products suffering from depression irrespective of whether it was reasonable, if it was in excess of the "lowest possible lawful rate" as defined by the Commission.

   c. That the order is invalid because:

      1. It violates Section 1, which prescribes only that the rates shall be just and reasonable, and not that they shall be "the lowest possible lawful rates", and Section 15, which permits the Commission to fix rates only when it finds that the existing rates are unreasonable.

      2. It is a regulation of industry and not a regulation of commerce, and hence is beyond the delegated authority of the Commission and the power of Congress and vio-

lates the constitutional rights of the carriers.

2. Appellees contend in their briefs:
   a. That the case is an ordinary rate case; that the Commission found the rates unreasonable under Section 1, and that there is substantial evidence to support such finding.
   b. That after first finding the rates unreasonable, the Commission then fixed new rates, taking into consideration the principles announced in the Hoch-Smith Resolution (i. e., that the industry was in a state of depression); that the Resolution did not change the law and that the same result could have been reached if the Resolution had never been enacted or invoked; that there is a zone of reasonableness* within which the Commission may fix rates, but that the Resolution "calls for the exercise of the Commission's discretion in a particular manner; that is that the Commission shall make rates upon products of agriculture affected by depression at the lowest rates which are lawfully possible * * *". (Brief of United States and Interstate Commerce Commission, p. 35)

It is conceded by the Intervener that if the Commission has based the new rates on industrial conditions or if the Commission did not find the rates to be unrea-

*Brief of United State and Interstate Commerce Commission (p. 33) "The Resolution itself, by the use of the words '*lowest* possible lawful rates' recognizes that there may be more than one lawful rate, that there is a 'zone of reasonableness,' and that there are flexible limits to the Commission's discretion in the prescription of rates for future application."

sonable under Section 1,† then its action is invalid; and if the Resolution authorizes rates to be fixed on the basis of commercial conditions it is unconstitutional.

The issues therefore are:

1. Did the Commission find the old rates unreasonable upon the basis of Section 1, or did it find only that they were in excess of the "lowest possible lawful rates" as defined by the Commission in interpreting the Resolution?
2. If it did not find that the old rates were unreasonable upon the basis of Section 1, is its action in fixing new rates which it considered as the "lowest possible lawful rates" (i. e., at the lower extremity of the zone of reasonableness) lawful, such action being taken because the deciduous fruit industry was in a state of depression, and not because the old rates were unreasonable. Counsel for the Appellees has conceded that if the order were so based it would be invalid. The sole question therefore remaining is whether the Commission found the old rates unreasonable under Section 1.

The record shows that the order is based on the standards prescribed in the Hoch-Smith Resolution as interpreted by the Commission and that the Commission did not consider the issue to be whether, or pretend to find that, the existing rates were unreasonable under Section 1, but only that they were in excess of

† Intervener's brief p. 46: "The Commission recognized that the existing rates must be proved unreasonable in accordance with accepted principles of rate making before it could proceed to accord products of agriculture affected by depression the lowest possible lawful rates compatible with the maintanance of adequate transportation service."

the lowest possible lawful rates, as defined by the Commission.

The Alleged Finding of Unreasonableness.

In this connection it is pertinent to point out that the validity of the order must turn upon the substance of what the Commission did, and not what it may have said it did, or what it might have done. The whole case of the Appellees depends upon their showing that the following isolated expression in the report:

> "We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 * * * is and for the future will be unreasonable to the extent that it exceeds or will exceed $1.60 * * * and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture."

is a finding that the existing rate was unreasonable, under Section 1 of the Act and not merely that it was "in excess of the lowest possible lawful rate" enjoined by the Resolution as interpreted by the Commission, and that the new rate was a reasonable rate under Sec. 1, and not the "lowest possible lawful" rate as defined by the Commission, although the Commission said in terms that it was the lowest possible lawful rate.

Viewed in the light of what the Commission did, what it said it did and what the complainant before it urged it to do, it is apparent that the finding just quoted represents only the Commission's view that the existing rate was in excess of the "lowest possible

lawful rate" enjoined by the Resolution (i. e., at the bottom limit of the zone of reasonableness).

No magic or infallibility attaches to the statement in the Commission's report that rates are "unreasonable." In the Willamette Valley lumber rate case (219 U. S. 433) the Commission found (14 I. C. C. 61):

> "* * * the present rate * * * is unjust and unreasonable."

In the first Lemon Rate Case (190 Fed. 591) the Commission found (19 I. C. C. 148):

> "* * * upon full consideration we are of the opinion that the present lemon rate * * * is unreasonable * * *."

In the Passenger Scrip Case (263 U. S. 603) the Commission found (77 I. C. C. 200):

> "We further find that the rates resulting from that reduction will be just and reasonable for this class of travel."

In each of these cases, counsel for the Government and the Commission advanced the same arguments in support of the order that are advanced here: That while it is true that the Commission heard evidence bearing upon commercial and industrial conditions, nevertheless there was evidence upon the question of whether the rate was intrinsically reasonable or unreasonable, and the Commission having made an express independent finding that the rate was unreasonable, the order was thereby rendered immune from judicial review.

Yet in each of these cases, the court experienced no difficulty in finding upon an examination of the reports

of the Commission that the Commission had not used the word "unreasonable" in the sense intended by the Act, and that its orders were invalid.

The carriers under the law have the right to initiate rates. If the rates they publish are not unreasonable no power exists in the Commission to alter such rates. In *Interstate Commerce Commission v. Louisville and Nashville R. R. Co.*, 227 U. S. 88, the court says, at page 92:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. * * *"

In this case it is contended by Appellees that there was such evidence, but a fair reading of the Commission's opinions shows that there was no finding that the rates were unreasonable, under the standard prescribed by the Act, but only a finding that the rates exceeded the "lowest possible lawful rates" as defined by the Commission. There was, therefore, no jurisdiction in the Commission to make the order.

What Power did the Commission Attempt to Exercise Here?

What did the Commission do here? Did it consider the question before it to be as the Appellees claim, whether the rates were unreasonable under Section 1,

or was it as we contend, whether such rates were the lowest possible lawful rates under the Hoch-Smith Resolution as interpreted by the Commission? It is contended by Appellees that the case was a mere rate case under Section 1, that the Resolution "played a distinctly secondary role" (Intervener's brief, p. 16), and that the Resolution did not change the existing law. Appellees further contend that as applied by the Commission, the Resolution "contains nothing which would lead the Commission to reach a result different from that which it could properly have reached without the aid of the Resolution" (Intervener's brief, p. 30).

If this be true;

a. Why did the shippers in their complaint to the Commission (R. 130) allege in almost every paragraph that the rates were in violation of the Hoch-Smith Resolution and the existing rate was not "the lowest possible lawful rate compatible with the maintenance of adequate transportation service" (R. 146); that the complainant "brings this complaint at this time to the end that relief may expeditiously be afforded, in pursuance of said Resolution" (R. 147), and that after hearing the Commission shall establish rates "such as will promote freedom of movement of said fruits at the lowest possible lawful rates compatible with the maintenance of adequate transportation service"? (R. 148)

b. Why does the Commission say in its report (1) that the Resolution is "primarily relied upon in the instant case," (R. 18), (2) that "these prices are shown to us in compliance with the terms of the Hoch-Smith resolution" (R. 23),

(3) "in complainant's view the markets must be brought nearer by means of rate reductions" (R. 22), (4) that "while undoubtedly overproduction and distribution pratices are factors in the situation the *essential* fact still remains that the industry is in serious financial straits" (R. 25), (5) that "in complainants view the existing depression in California deciduous-fruit industry is precisely such as the Hoch-Smith Resolution was designed to assist" (R. 25)?

c. Why does the Commission early in its report devote pages (R. 26-28) to a discussion of the Resolution and its interpretation, and reach the conclusion "that 'the lowest possible rates' which we may prescribe under the resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level or that zone as is compatible with the maintenance of adequate transportation service" (R. 28)?

d. Why in distinguishing other cases does the Commission say,

(1) "Moreover the case was decided prior to the passage of the Hoch-Smith resolution" (R. 41); that such cases would not necessarily constitute precedents against the granting of relief if the same rates were assailed with an adequate showing of a change in facts or "in the basic law applicable" (R. 41),

(2) "Under the Hoch-Smith Resolution the

relative prosperity of an industry over a period of years may be considered as well as its relative adversity" (R. 42)?

e. Why does the Commission devote much space to a discussion of the meaning of "freedom of movement" as used in the Hoch-Smith Resolution and the "effect of the proposed reduction on the industry" (R. 48), and why does it say that while "it is impossible to prophesy with assurance what results would flow from a reduction in rates. * * * Complainant claims that a reduction in rates will prove of direct benefit to the producer * * *" (R. 49), also "assuming that the reduced rate would not be reflected in reduced selling prices, the reduction here sought * * * would afford substantial relief to the growers who bear probably the major portion of charges directly or indirectly, and would mean the difference between a loss and a small profit to many of them" (R. 49)?

f. Why does the Commission say that the economic situation of the industry "is such that it clearly comes within the terms of the Hoch-Smith resolution as entitled to the lowest possible lawful rates" (R. 56)?

g. Why did it say "The *primary* issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us" * (R. 56)?

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*Note that the "primary" issue as stated by the Commission is not whether the existing rate is reasonable but whether it is at the lowest limit of the zone of reasonableness. Contrast this with Intervener's contention that the Commission first determined the rate was unreasonable under Section 1, and then and only then proceeded to fix a new rate at the lowest limit of the zone of reasonableness. (Intervener's Brief, p. 28)

h. Why did the Commission recite as among the nine important differences between this case and the prior case where the same rates had been held reasonable, the following:

"1. The Hoch-Smith Resolution was approved subsequent to the presentation of the prior case."

"2. The depression in the deciduous fruit industry has continued unabated * * *."

"3. The present economic showing is fully responsive to the terms of the Resolution" (R. 57)?

j. Why did the Commission make its ultimate finding "We are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined." (R. 58) rather than follow the simpler practice of stating that the present rates are unreasonable under Section 1?

k. Why did the Commission find that the new rates "are the lowest possible lawful rates" (R. 59) instead of finding them just and reasonable rates under Section 15?

l. Why did Commissioner Eastman in his concurring opinion say that "while it was by no means clear that the rates in issue are unreasonable and ought to be reduced complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt" (R. 59)?

m. Why does Commissioner Woodlock (Commissioner Taylor concurring) say "The Hoch-Smith resolution (which governs the disposition of this case)" (R. 60)?

n. Why does Commissioner McManamy say "The

majority report as well as the concurring expressions show that the decision is predicated on the Hoch-Smith Resolution." (R. 63)?

o. Why does the Commission in its Report on Further Consideration say "we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service." (R. 68)? Why did not the Commission merely say that the new rates were just and reasonable rates?

p. Why has the Commission constantly cited this case as one wherein the Hoch-Smith Resolution was applied?

Georgia Peach Growers Exch. v. A. G. S. R. R., 139 I. C. C. 143,
Boston Wool Trade Assn. v. Apache Ry., 144 I. C. C. 111,
Lake Cargo Coal, 139 I. C. C. 367.

q. Why is this case referred to in the Forty-first Annual Report of the Interstate Commerce Commission (page 67) as one wherein "we have had occasion to construe the Hoch-Smith Resolution"?

r. Why did Commissioner Eastman in the hearing on the Appropriation Bill for 1930 where funds were asked for to carry on the work under the Hoch-Smith Resolution testify:

"Mr. Eastman: In the first place, I think that I ought to say that the Hoch-Smith Resolution has had some positive results in addition to the hearings in these investigations.

"Mr. Summers: In the southeastern part of the country, and also in the southwestern part of the United States.

"Mr. Eastman: And also on the Pacific Coast, in the reduction of rates on deciduous fruits, for example. The carriers, by the way, carried that case to the courts, and they are attempting to secure an interpretation of the Hoch-Smith Resolution through the medium of that case, but those reduced rates have gone into effect"?

(Record of Hearing, pp. 182-183)

It is submitted that the answer to these questions inevitably results in the conclusion:

1. That the Commission construed the Resolution as requiring it to reduce rates on agricultural products suffering from depression, irrespective of whether the existing rates were just and reasonable, if they were in excess of the "lowest possible lawful rates", (i. e., at the lowest limit of the zone of reasonableness).
2. That the Commission construed the Resolution as requiring it to fix rates for agricultural products affected by depression at the lowest limit of the zone of reasonableness, irrespective of the cause of the depression or whether it was due in any respect to or reflected in transportation considerations.

From this we submit that the following propositions have been established, as set forth in our brief:

1. That the Commission acted in excess of its lawful powers, in that it considered that it had power

to set aside reasonable rates established by the carriers, whereas in fact neither the Resolution nor the Act confers this power on the Commission, the carriers still retaining the absolute right to establish and maintain rates so long as they were reasonable.

2. That the action of the Commission, pursuant to the Resolution is a regulation of industry and not of commerce and is therefore void.

The Rate Evidence.

The Appellees make much of the fact that there was evidence bearing upon the reasonableness of the rates attacked, stating:

> "If the Commission was not concerned with testing the reasonableness of the existing rates under Section 1 of the Interstate Commerce Act, it is difficult to see why it should have devoted one-half of its original report to a discussion of matters which pertain only to the question of the reasonableness of the existing rates in accordance with accepted rate-making principles." (Intervener's brief, pp. 18-19.)

The quantity of evidence introduced does not prove that the Commission proceeded in accordance with law, or that its order is valid, or that such evidence was deemed by Commission as sufficient to justify a finding that the rates were unreasonable measured by the standard of Section 1.

What use did the Commission make of the evidence? For what purpose did it weigh it? What were its conclusions based upon it? The record is clear on these points.

The Commission considered the evidence only for

the purpose of determining whether the existing rate was "the lowest possible lawful rate" under the Resolution, and for no other purpose. This is clear from the statement in the Report (R. 56):

> "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us"

and by the ultimate finding (R. 58):

> "* * * we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

If the primary issue, in the view of the Commission, was whether the rates were "the lowest possible lawful rates" and not whether they were reasonable or unreasonable, it is obvious that the evidence was considered and viewed with the single object of reaching a determination of that issue. The evidence was entirely relevant to that issue, and was undoubtedly used for that purpose. It is futile to speculate as to what the view of the Commission would have been had it properly pursued the law and considered the evidence from the standpoint of the reasonableness of the existing rate. That issue was not considered by the Commission, and the fact that there was evidence that might have been used for this purpose may point to a lost opportunity, but it certainly is no proof that it was used for that purpose.

This Court Cannot Substitute Its Judgment for That of the Commission.

Having invoked the aid of the Resolution in securing reduced rates, the Appellees now strive to convince

the court that the same result would have been attained if the Resolution had never been enacted, if the shippers had never invoked it or the Commission had never relied upon it.

However that may be, the Resolution was the basis of the Commission's action; its order is founded upon it. In making its order the Commission misapplied the law, and its order is, therefore, invalid. It is beside the issue to contend that there was a plenitude of evidence upon which the Commission could have found the rate unreasonable under Section 1. The fact is that the Commission did not consider that to be the issue, and confined itself to the single issue as to whether the existing rate was in excess of "the lowest possible lawful rate." What it would have done had it correctly interpreted and applied the law, is a matter of speculation, into the realms of which this court cannot enter. This court may not substitute its judgment or discretion for that of the Commission. The order is void because the Commission applied the wrong legal measure. If the shippers believe that the rate is unreasonable measured by the proper standards of law, their course is to initiate a new proceeding before the Commission in which the Commission will apply the proper standards.

Contrasting Views

As perhaps the best expression of the contrasting views as to the proper meaning and interpretation of the Resolution, we quote the following expressions.

Commissioner B. H. Meyer, on January 15, 1928, publicly stated his interpretation of the Resolution to be:

"You are all familiar with what is known as the Hoch-Smith Resolution. * * * While in form it is a resolution, in essence it is an amendment to the Interstate Commerce Act and has all of the force and effect of law. * * *

"From the time of its creation to the passage of the Hoch-Smith Resolution the Interstate Commerce Commission has said hundreds and probably thousands of times in its official reports that its duty under the law was to deal with transportation conditions and not with commercial conditions. * * *

"The Hoch-Smith Resolution changed all this. It not only authorizes us but it directs us to take into consideration commercial conditions. * * *

"Responsive to the direction contained in the third paragraph of the Hoch-Smith Resolution to the effect that the Commission shall with the least practicable delay prescribe the lowest possible lawful rates on the products of agriculture which are affected by depression compatible with the maintenance of adequate transportation service, we have issued a number of reports in which such rate changes have been made, based in part or entirely upon the third paragraph of the Resolution. One of these orders has been taken into court by the carriers and before very long we hope to have the benefit of the views of the Supreme Court of the United States with reference to the proper interpretation of the Hoch-Smith Resolution.*

"I might summarize what appears to me to be the underlying theory expressed in the Resolution by saying that it attempts to make the railroads of the United States the shock absorber and balance wheel for the entire economic life of the country to the extent to which this may be accomplished through the instrumentality of railroad rates."

* This case is the one referred to.

The contrary view which, in our opinion, expresses the true intent and purpose of the Resolution was stated by Senator Glass before the Committee on Interstate Commerce of the United States Senate when that Committee was considering the confirmation of John J. Esch to be a member of the Interstate Commerce Commission. Senator Glass said (Report of Hearings, pp. 76-77):

> "There is nothing unconstitutional about the Hoch-Smith Resolution. There is really nothing contrary to the statute in the Hoch-Smith Resolution. I have not been here, but I assume your attention has been called to the fact that the Resolution directs this inquiry and the conclusions to be had in accordance with the law. Therefore, the Hoch-Smith Resolution did not modify in the remotest way the statute itself. It was a mere expression of the sense of Congress that if at that time, momentarily, any relief could be given to these interests in accordance with law, that Congress would desire it to be done. That is all there is to the Hoch-Smith resolution."

And, as illustrative of the course of this case before the Commission in both the first and the second proceeding, we quote the following statement of former Commissioner Esch made before the Committee on Interstate Commerce of the United States Senate when that Committee was considering confirmation of his appointment (page 33):

> "We have employed that Hoch-Smith resolution in a recent case known as the Western Fruit Case, wherein the complainant filed a complaint with the Commission claiming that their rates on deciduous fruits from the Pacific Coast to eastern

points of destination were unreasonable. That was heard prior to the passage of the Hoch-Smith Resolution. We dismissed the complaint. After the complaint was dismissed and the Hoch-Smith Resolution was adopted in January, 1925, the complainant filed a new complaint, alleging that under the Hoch-Smith Resolution as to the depression in agriculture or any agricultural products that it should be considered as a part of its complaint and cause of action. We heard that case under the new complaint. We found the rates to be unreasonable to the extent of 15 cents per hundredweight to points east of Colorado common points, and 12 cents in excess to Colorado common points, the reduction being, as I recall it, down to $1.65 to eastern destinations. And in that report we indicated that the reason for granting the reduction of those rates was the Hoch-Smith resolution. After that decision was handled down 48 western carriers immediately went to the United States District Court in San Francisco to enjoin our orders on the ground that the Hoch-Smith Resolution was not capable of the interpretation we had given it, and if it were it was unconstitutional. The United States District Court did not grant the injunction, and an appeal, I understand, is to be taken, so that we are in the way of having the Hoch-Smith Resolution interpreted by the Supreme Court."

To Summarize:

The order was founded upon the Hoch-Smith Resolution.

The Commission interpreted and applied the Resolution as requiring it to fix rates upon the following basis:

1. If the rate attacked is on an agricultural product,
2. If that product is suffering from a depression (no matter what the cause),
3. If the existing rate is in excess of "the lowest possible lawful rate" (as defined by the Commission to be at the lower limit of the zone of reasonableness), irrespective of whether or not it is reasonable under Section 1,

then upon this showing alone, the Commission must reduce the existing rate to "the lowest possible lawful rate" as defined by it.

As the lowering of the rate is purely mechanical and is brought about by the depression in the industry (irrespective of its cause or whether it is due to or is reflected in transportation conditions), it becomes obvious that the order is void because

1. The rate is based upon commercial considerations and not upon transportation considertions,
2. The rate is a regulation of industry and not of commerce,
3. It is in excess of the power conferred on the Commission,
4. It is in excess of any power possessed by Congress.

As has been pointed out, the Commission never possessed the power which it assumed to exercise. Nor did the Hoch-Smith Resolution, properly interpreted, pretend to confer this extraordinary power upon the Commission. The Resolution, properly interpreted, did not change the existing law. It is therefore not unconstitutional. But the order of the Commission, based upon

the assumed power to shift the rate burden from depressed agriculture to other industries, to regulate industry through the medium of regulating rates, and to set aside reasonable rates fixed by a carrier, is we submit, clearly invalid.

Other Issues.

In our brief we have discussed several additional issues, such as the error of the Commission in undertaking to apply the Hoch-Smith resolution, contrary to its terms, in a proceeding involving only the rates on a single commodity and not a rate structure; the holding of the Commission that the new rates are "necessary to promote the freedom of movement" of these deciduous fruits when the record shows without contradiction that they were moving with extreme freedom under the old rates, in fact that the depression complained of is due principally to the excessive freedom of movement, beyond the consuming capacity of the markets; and the failure of the Commission to meet its obligations under section 15A of the Interstate Commerce Act by leaving undisturbed the former rates, not unreasonable in themselves, when the carriers were found to be not making a fair return on the value of their properties, or at the very least, if rates on agricultural products were reduced because of a financial depression in the industry (not found to be caused in any degree by the rates charged) to redistribute transportation rates so as to preserve intact the net revenues of the carriers. The Appellees have discussed these same issues. By our failure to comment further thereon we do not in any way recede from the position taken in our brief. We feel that we have fully covered these matters and rely on the argument already made.

The issues are relatively simple, the Appellees have brought forth no new propositions in respect thereto and further discussion is unnecessary.

Confiscation.

One of the main issues in the case does, however, require some further comment. In response to our charge of confiscation, admittedly a ground for reversal of the Order if supported by the facts, Appellees are driven to the expression of doubts regarding the revenues under the new rates and the cost of handling the traffic, entirely inconsistent with the views expressed by the Commission itself when it decided the case, and unsupported by the record. It is now claimed that the revenues under the new rates will be greater than alleged in our complaint, that the loss of revenue will be in large part made up by an increase in the minimum weight on grapes and that the cost of service will, or may be less than alleged by the carriers. After prolonged argument to the effect that full reliance should be placed on the single expression of the Commission, in the concluding paragraph of its opinion (R. 59) "* * * the rate of $1.73 * * * is, and for the future will be, unreasonable * * *" without regard to the preceding discussion by the Commission or the succeeding statement which indicates the sense in which the word unreasonable was used, counsel for appellees now seek to cast doubt upon the cost study presented by the carriers, to suggest *possible* infirmities therein, to assume that it could have been discredited by cross-examination which was not undertaken or by contrary evidence which was not presented, and upon such assumptions they argue that it is "permeated with fallacy" (Intervener's brief, p. 74), and wholly unreliable.

We will not undertake to reply to all these newly discovered doubts as to the accuracy of the cost study advanced by counsel for appellees. The parties had their day in court. Then was their opportunity to show these errors if there was any foundation for the assertions now made. No limit was placed upon their cross-examination or rebuttal evidence. In fact certain information was called for by complainant before the Commission to be furnished after the hearing closed, and all the information requested was furnished. The fact that this testimony was offered on the last day of the hearing is no legitimate criticism of its validity. We have advanced no objection to any of complainant's testimony because of the time when it was presented. Nor is any greater comfort to be derived from the fact that it was continued on a single sheet of paper, unaccompanied by the detailed calculations from which "a check can be made of the mechanical or clerical accuracy of the results" (R. 54) now so strongly relied on. If such data were desired it could have been requested. It was not requested by complainant or by the Commission which has ample power to investigate the carriers' accounts. It was presented by an accountant of recognized standing and accompanied with testimony as to the propriety of its application to 1926 traffic (R. 480) in view of the fact that it was made in 1923. Testimony was also given (R. 482) as to the propriety of measuring costs on the other routes, composed in every case of two or more lines, by those incurred on the single-line route of the Santa Fe. In short the showing was adequate, and was not contradicted.

The best answer to the contentions now advanced by counsel is to be found in what the Commission itself

said about the cost study, when it thought its Order could be supported thereby. After criticising other cost studies offered by the carriers, relied on by us only to show general conditions and the propriety of projecting the Santa Fe costs east of Chicago, and to which counsel now devote many pages of their briefs, the Commission said (R. 53):

> "It will be unnecessary to refer to them further, as the record affords an additional study made by the Santa Fe in 1923 which comes nearer to being constructed upon a sound basis than the others referred to."

The Commission goes on to describe the cost study, and mentions certain objections made thereto by complainant. After commenting on the absence of details from which mechanical and clerical accuracy could be checked (the statement having been introduced and verified by an expert accountant, testifying under oath) the Commission says, (R. 54) "The methods employed in reaching the results seems to be satisfactory. * * * Other items were reasonably apportioned to the grape trains * * *." Certain corrections on account of empty car haul are then made, to which we will refer shortly, and the Commission finds (R. 55) "* * * an indicated cost of $414.02 per car. The average revenue per car in 1926 under present rates was $489.59." It is finally noted that nothing is including for taxes or rentals and and the study covers a single-system operation. A single system operation is generally conceded to be cheaper than where two or more lines participate in the haul, as is the case on every route from California except the Santa Fe.

The Commission later states that "the reduction

requested, if granted, would not affect the maintenance of adequate transportation service," (R. 56) and finally in its statement of the grounds of its decision (R. 58) says that its conclusion is reached after "giving due weight to the cost study presented by defendants." Such were the views of the Commission as to the cost study *when it made the order* here under attack. By repeated reference the Commission clearly indicates that the cost study was deemed by it to be like similar testimony referred to by this court in *Northern Pacific Railway Company v. Department of Public Works of the State of Washington*, 268 U. S. 39, where at page 43, Mr. Justice Brandeis said:

> "This evidence was in character persuasive. It was fairly specific, direct and comprehensive."

Such was the view of the Commission as to the cost study when the order here complained of was formulated and promulgated. In a petition for reconsideration the carriers called the Commission's attention to an error made by it amounting to $20.79 per car due to the use of an erroneous percentage of empty-car haul. In its Report on Further Considerations (R. 66) this is admitted, "It is true that this suggestion of a reduction of the allowance for the return of empty cars was unwarranted." Then, for the first time, arise any questions about the costs, and still additional questions are now suggested in the brief filed by counsel for the Appellees. It is found (R. 67) that the difference between the corrected cost figure and the average revenue *under the old rates* would not be eliminated by the reduction, if an increased earning is assumed from the reduced rates by reason of a higher minimum. No one suggests earnings in excess of $480 per car compared to $489.59 under the old rates.

In its Report on Further Consideration the Commission states (R. 67) "we have not accepted the cost study as indicating *precisely* the actual cost of handling this traffic" and again (R. 68) "Some additional *possible* defects in the study have come to our attention" and (R. 68) "While consideration was given to the cost study submitted by defendants it was not the *controlling* factor in our decision."

It is now contended that the study is "permeated with fallacy," that it is utterly unreliable and that there never was and never could be a reliable cost study of any single item of traffic. Speculations are copiously indulged in by counsel as to what corrections might be made therein and it is freely charged that it contains improper items, not consistent with its purported scope. We will not prolong this discussion by any further mention of these contentions, unsupported by evidence, hypothetical in character and inconsistent with the Commission's characterization of the study given when it made the order.

Suffice it to say, the Commission had the study before it. It, or complainant, could have called for further information if desired, but did not do so. If so obviously improper as now suggested, and so "permeated with fallacy" and if a crude attempt to perform the impossible (any accurate cost study being an impossibility according to counsel for the Commission, brief p. 71) why did the Commission say that "the methods employed * * * seem to be satisfactory" and that items "were reasonably apportioned" (R. 54) and why did it give "due weight to the cost study presented by defendants" (R. 58)? If it were subject to all these infirmities and fallacies, if it were a chimerical pursuit of an unattainable object it was entitled to no weight in

the disposition of this case. It should then be discarded and was not entitled to be taken as indicating in any way the cost of service. It was obviously never a "controlling factor" in the Commission's decision but under the condition now suggested by counsel it could not have been properly a factor of any kind.

It is obvious that it was accepted by the Commission, perhaps not as indicating "precisely" the cost of service, but certainly a close approximation of such cost. It was not contradicted in any way and was the only evidence of cost available to the Commission. In view of the task to which it set itself, upon a complaint which invoked the Hoch-Smith resolution, to find the "lowest possible lawful rate" that rate being just above the point of confiscation it is submitted that evidence of the cost of service was indispensable. To avoid confiscation cost must be returned plus a substantial profit. How can it be determined whether the profit is substantial if the cost of service is unknown. If the cost study be accepted, as it was by the Commission, it proves the rates confiscatory. If it be rejected, as counsel now undertake to do, the Commission's order is proved to be capricious, an act without evidence and void.

Whether the cost study were accepted as accurate, as a fair reading of the opinion of the Commission implies, or taken as a mere approximation, which is the least to be said in view of the finding that due weight had been given thereto (R. 56) it had not changed in character between the original opinion and that on further consideration. It was not rejected at any time. It remains for counsel for the Appellees

to do what the Commission itself refused to do. The weight given the study in the "due consideration" thereof was not changed in the two opinions. How then could the "lowest possible lawful rate" be the same when the operating costs (not including taxes or rentals) were erroneously thought by the Commission to be $414.02 as when they were corrected to $433.68? Regardless of how accurate either figure was thought to be, it is impossible for the irreducible minimum rate to be the same in both cases. If the rate was as low as it could be placed in view of the Constitutional rights of the carriers in the one case, (and that is the rate that the Commission undertook to fix), and such cost figures as were used, to any extent, were later admitted to be in error by the amount of $20.79 per car, by reason of the Commission's error in computing the empty haul it necessarily follows that some increase must be made to this "lowest possible lawful rate." The rate is confiscatory unless it returns the cost of service plus a substantial profit (*Northern Pacific Railway Co. v. North Dakota,* 236 U. S. 585). The substantial profit at first allowed is diminished by approximately $20 per car, on a traffic of approximately 80,000 cars per annum. It was necessarily confiscatory after the Commission's error was conceded.

Conclusion.

Our purpose in filing this reply brief is confined to the effort to more clearly define the fundamental issues, as to which counsel for Appellees have now adopted a position which is not only inconsistent with, but,

it seems to us, directly contradictory to that taken by the Commission in its opinions in this proceeding.

We submit that the fundamental questions here presented are: Did the Commission undertake to exercise a power which had never been entrusted to it? Has the Commission power to set aside reasonable rates fixed by a carrier in the exercise of its managerial functions, because they apply to an agricultural industry suffering from depression, and are in excess of the "lowest possible lawful rates" as defined by the Commission? May the Commission fix rates on a lower basis for an agricultural industry suffering from a depression, than it may fix for any industry enjoying prosperity, merely because of that depression and not because of transportation conditions? May the Commission shift the burden of rates from depressed agricultural products onto the products of the forest and the mine? If the Commission undertook to exercise such power the purported source of the power is immaterial. We submit that it was not and could not have been granted by the Hoch-Smith Resolution. This court has often held that it had not been granted by the Interstate Commerce Act prior to the adoption of the Resolution. It is an attempt to regulate industry,

not to regulate commerce, and we submit, clearly beyond the power of the Commission.

Respectfully submitted,

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